IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,	**3:16-cr-00051-BR**
Plaintiff,	**ORDER RE: FINAL PRETRIAL CONFERENCE**
v.	
AMMON BUNDY, RYAN BUNDY, SHAWNA COX, PETER SANTILLI, DAVID LEE FRY, JEFF WAYNE BANTA, KENNETH MEDENBACH, and NEIL WAMPLER,	
Defendants.	

BROWN, Judge.

This Order Re: Final Pretrial Conference includes the Court's definitive rulings on disputed issues raised or argued during the Final Pretrial Conference on August 23, 24, and 25, 2016, and as otherwise brought to the Court's attention to date. To the extent that the rulings stated herein differ in any respect from the Court's statements during the Final Pretrial Conference or from prior Orders, this Order controls. To the

extent that any party objects to the Court's rulings herein, that party now has a "continuing objection" thereto and has preserved for appeal any claim of error associated with the ruling. Accordingly, such objecting party must not interrupt the trial proceedings to restate such objection in the jury's presence during the trial. In the event any party believes developments at trial warrant reconsideration of any ruling stated herein (*i.e.*, when a party contends another party has "opened the door" to such reconsideration), such party must first bring the issue to the Court's attention outside of the presence of the jury, and, in any event, such party must not raise the issue in the jury's presence without advance leave of Court to do so.

GOVERNMENT'S MOTION (#959) *IN LIMINE* TO EXCLUDE THE DEFENSE OF ADVERSE POSSESSION

The Court **GRANTS in part** and **DENIES in part** the government's Motion (#959) *in Limine* to Exclude the Defense of Adverse Possession. Adverse possession is not a legal defense to any of the charges in the Superseding Indictment (#282). As specifically relevant to a Defendant's state-of-mind at the time of the events at the Malheur National Wildlife Refuge (MNWR), each Defendant may, nonetheless, testify and introduce evidence that each specifically intended to assert (or to assist in asserting) a claim of adverse possession over the MNWR but did

not intend to impede any officers of the United States by force, intimidation, or threat.[1]

DEFENDANT KENNETH MEDENBACH'S MOTIONS (#995, #999) *IN LIMINE*

The Court **GRANTS in part** and **DENIES in part** Defendant Kenneth Medenbach Motions (#995, #999) *in Limine*. After conferral during the Pretrial Conference, the government agreed evidence regarding the subjective impressions of the MNWR employees would be limited to evidence about the closure of the MNWR and the reasons for that closure. The Court concludes this limited evidence is admissible as relevant, circumstantial evidence of the Defendants' intent to impede by force, intimidation, or threat and as relevant to the government's burden to demonstrate that any threats or intimidation that Defendants may have agreed to employ in furtherance of the alleged conspiracy to impede the MNWR employees were such that a reasonable person observing them would interpret them as serious expressions of intent to harm.

The Court, however, excludes from the government's case-in-chief evidence of the subjective impressions of MNWR employees to the extent such impressions were not directly related to the

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[1] The Court acknowledges the post-Pretrial Conference filing by Defendant Ammon Bundy of his Motion (#1155) to Dismiss for Lack of Subject Matter Jurisdiction re: Adverse Possession, which the Court will consider separately on the briefing schedule set in Order (#1161).

closure of the MNWR unless and until a Defendant puts such subjective impressions of the MNWR employees at issue.

Finally, the Court finds evidence relating to the reactive fears or impressions of members of the community at large is not admissible in the government's case-in-chief because such evidence is irrelevant to the Defendants' alleged agreement to impede MNWR employees.

Although the Court concludes evidence of alleged damage Defendants caused at the MNWR is admissible because it is relevant to Defendants' alleged intention to impede, the Court notes the government does not intend to offer at trial any evidence regarding the value of or cost to repair such damage (reserving such issues to sentencing proceedings in the event any Defendant is convicted). Similarly, the Court concludes evidence relating to firearms found on the MNWR is admissible because a sufficient nexus exists between those firearms and the alleged conspiracy, and that evidence is relevant to the Defendants' alleged intent to impede by force, intimidation, or threat.

DEFENDANT FRY'S MOTION (#1000) *IN LIMINE*

The Court **GRANTS in part** and **DENIES in part** Defendant David Lee Fry's Motion (#1000) *in Limine*.

I. Co-Conspirator Statements

The Court concludes the statements made by Ammon Bundy, Ryan

Payne, and other individuals to Sheriff Ward before January 2, 2016, are admissible against all Defendants who the jury finds were then members of or who later joined the alleged conspiracy as co-conspirator statements under Federal Rule of Evidence 801(d)(2)(E) for the purpose of demonstrating the existence and purpose of a conspiracy. *See United States v. Segura-Gallegos*, 41 F.3d 1266, 1271 (9th Cir. 1994)("Statements of . . . co-conspirators are not hearsay even if they were made before [the Defendant against whom the statement is offered] entered the conspiracy."). *See also United States v. Little*, No. CR 08-0244 SBA, 2012 WL 2563796, at *5 (N.D. Cal. June 28, 2012).

The Court concludes statements made by any co-conspirator to the news media regarding the events at the MNWR were also made in furtherance of the alleged conspiracy and, therefore, are admissible as to any Defendant who the jury finds was a member of the conspiracy. Moreover, on the government's proffer the Court concludes that evidence of the dissemination through the media of potentially threatening or intimidating messages to officers of the United States who heard them and, similarly, the recruitment of others through the media to join or to assist the alleged conspiracy these statements are relevant to prove the primary purpose and object of the alleged conspiracy.

As the parties ultimately agreed at the Pretrial Conference, testimonial statements made by a Defendant or alleged co-

conspirator after that individual was taken into custody are not admissible as statements of a co-conspirator because such statements are not made in furtherance of the alleged conspiracy. To the extent that any such statement was made by a Defendant, however, that statement is admissible as to that Defendant only as a statement of a party opponent.

The Court has reviewed the government exhibits in question and, in accordance with these standards, concludes that government's Exhibits 49, 72, 616, 617, 638, 666, and 672 are admissible under Federal Rule of Evidence 801(d)(2)(E) for the purpose of demonstrating the existence and purpose of the alleged conspiracy as to all Defendants whom the jury finds joined therein.

II. Evidence Regarding the 2014 Events in Bunkerville, Nevada

Unless a Defendant opens the door to further evidence, the Court concludes very limited evidence regarding the events in 2014 in Bunkerville, Nevada, is relevant and, therefore, necessary and admissible in order to provide context to various independently admissible statements that reference those events. This evidence, which the Court encourages the parties to submit in a stipulation[2] that can be read to the jury, is limited to basic background information about the source of and participants

[2] As with Defendant Shawna Cox's Stipulation (#1148) with the government, the Court notes and appreciates the proffered Stipulation (#1149) as to Jeff Wayne Banta.

in the conflict, including the fact that the Bureau of Land Management's efforts to execute certain court orders were suspended as a result of an armed standoff between government agents and individuals who opposed their efforts to execute such orders.

III. OIG Investigation of the Shooting of Lavoy Finicum

The Court excludes evidence regarding the United States Department of Justice Office of the Inspector General (OIG) investigation of the shooting of Robert "Lavoy" Finicum. As the Court noted in its Order (#887) Denying Motion to Compel Production of the Investigation of FBI Use of Force in the Finicum Shooting, the "very important questions whether the shooting of Lavoy Finicum was justified or whether [Federal Bureau of Investigation Hostage Rescue Team] officers engaged in misconduct at the time of that shooting are beyond the scope of this criminal case," and, therefore, evidence about the OIG investigation is not relevant to this matter.[3]

Limited evidence regarding the fact of Finicum's death and its effect on the state of mind of the Defendants who remained at the MNWR thereafter is, nonetheless, relevant and admissible.

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[3] The Court continues to rely on the government's representation that it will not call as a witness in this trial any of the federal agents whose conduct is the subject of the OIG investigation.

IV. Videos of David Lee Fry

Fry moves to admit several videos of himself that he posted on his YouTube channel while he was staying at the MNWR. Fry moves to admit these videos on the basis that they are offered for the nonhearsay purpose of demonstrating the declarant's then-existing state of mind under Federal Rule of Evidence 803(3). In particular, Fry contends he intends to demonstrate through the videos that he was in a peaceful state of mind while at the MNWR before the shooting of Lavoy Finicum on January 26, 2016; the absence of any firearm in Fry's possession during the videos; and that he was frequently isolated from the other Defendants with whom the government alleges Fry conspired.

Although the Court agrees with Fry that the videos are offered for a nonhearsay purpose, the Court concludes many of the videos are not relevant. In particular, the Court excludes the videos titled "Family Singing 'Amazing Grace,'" "Breakfast Time," "The Pork Eater," "Snack time," "Random Books People Sent," "More Random Books," and "The Quails." These videos are not materially relevant to the issue whether Fry joined the conspiracy alleged by the government and at best constitute specific-instance character evidence that is not admissible in Fry's case-in-chief. *See* Fed. R. Evid. 405(a). To the extent these videos bear marginal evidentiary value, the Court also finds they would constitute a waste of time and, therefore, excludes the videos

under Federal Rule of Evidence 403.

The Court, however, concludes the videos titled "My Humble Abode," "Reading from the Quran," "Squirrel or Groundhog," and "Quick Update" are relevant and admissible. These videos bear greater relevance to whether Fry joined the alleged conspiracy and whether and for what purpose he may have possessed firearms during the time he spent at the MNWR.

EVIDENTIARY MATTERS RAISED BY DAVID LEE FRY AT THE AUGUST 30, 2016, HEARING

The Court **OVERRULES** Fry's objection to the government's introduction of Fry's statement during the period after Finicum's death and after the arrest of co-Defendants that Fry would shoot FBI agents who attempted to arrest him. The Court concludes that statement is relevant to Fry's state of mind; his intent to stay at the MNWR; and, therefore, his alleged intent to thereby impede (or to continue to impede) officers of the United States. The Court does not find this statement to be unfairly prejudicial, especially in light of the fact that Fry intends to introduce expert-witness testimony to explain his state of mind at the time he made this statement.

The Court also **OVERRULES** Fry's objections to government's exhibits 670 and 671. These videos are relevant to Fry and the other alleged co-conspirators' intent to fortify, defend, and

remain on the MNWR and, therefore, their alleged intent to impede officers of the United States by force, intimidation, or threat.

DEFENDANT PETER SANTILLI'S MOTION (#1006) *IN LIMINE*

The Court **GRANTS in part** and **DENIES in part** Defendant Peter Santilli's Motion (#1006) *in Limine* as follows:

I. Video of Removal of Cameras

The Court finds the video of cameras at the MNWR being removed in which Santilli makes a brief appearance is relevant to the conspiracy alleged in Count One because it is relevant to establishing Defendants' intent. Moreover, the video of the removal of the cameras is directly relevant to the Count Five theft charge against Ryan Bundy, which is premised on the theft of those cameras.

II. Evidence of Santilli's Statements and Conduct

The Court finds evidence regarding Santilli's statement to a counter-protester that the individual "better not bring a butter knife to a gunfight" is admissible because it is relevant to Santilli's intent and the government's theory of the case as to the purpose for the possession of firearms by the individuals at the MNWR.

The Court, however, excludes any evidence of Santilli's other conduct and statements to counter-protesters and media in the government's case-in-chief because it is not directly

relevant to the alleged conspiracy to impede federal officers by force, intimidation, or threat. The Court notes, however, Santilli will open the door to such evidence if he testifies, argues, or introduces evidence that his role at the MNWR was merely as a reporter and not a member of any alleged conspiracy because the government could argue this challenged evidence would permit a rational juror to infer that Santilli was acting as a co-conspirator and not as a member of the media. If Santilli intends to introduce this subject during his opening statement, the Court concludes he will open the door, and the government may then proceed with this evidence in its case-in-chief.

III. Santilli's Publication of Documents Taken from MNWR

The Court finds evidence that Santilli published on his website documents that were taken or copied from the offices at the MNWR is relevant to both the intent of the alleged co-conspirators in general as well as to Santilli's intent specifically. In the event Santilli testifies, however, the government may not ask Santilli about the source from which he obtained the documents.

DEFENDANT SANTILLI'S MEMORANDUM (#1011) IN OPPOSITION TO THE GOVERNMENT'S TRIAL MEMORANDUM

Santilli also moves to admit approximately 10 hours of video and audio recordings that he generated at the MNWR and during the

time that he spent in the surrounding area. Santilli contends these videos (many of which contain Santilli's own statements) are offered for the nonhearsay purpose of demonstrating Santilli's state of mind and intent during that period. *See* Fed. R. Evid. 803(3). In particular, Santilli offers these videos to demonstrate his involvement in the events at the MNWR was to act as a journalist and to document the events as they were unfolding, and that he, therefore, was not part of the conspiracy alleged by the government and did not intend to impede any officer of the United States by force, intimidation, or threat. The Court agrees with Santilli that the recordings are admissible for that nonhearsay purpose and are relevant to show Santilli's intent. The Court, nonetheless, advises Santilli that 10 hours of recordings are neither necessary nor admissible under Rule 403 to make that point.

The Court, therefore, will sustain an objection to this evidence in the event the presentation of these recordings becomes unnecessarily cumulative. In addition, the Court notes the admission of this evidence would independently permit the government to offer evidence to rebut Santilli's contention that he was acting as a journalist.

DEFENDANT NEIL WAMPLER'S MOTION (#1014) *IN LIMINE*

The Court **DENIES** Defendant Neil Wampler's Motion (#1014) *in*

Limine. Although there is currently insufficient evidence that Wampler's emails to Sheriff Ward were made in furtherance of any conspiracy that Wampler had joined at that time, the emails are, nonetheless, relevant to Wampler's then-existing state of mind and intent. In particular, Wampler's references to the sheriff who responded to the Bunkerville matter could be viewed by rational jurors as reflecting a particularized intention to impede officers of the United States in the future. Therefore, on the record to date, the emails are admissible as to Wampler only as statements of a party opponent.

DEFENDANT SHAWNA COX'S MOTION (#1046) MOTION *IN LIMINE*

On August 30, 2016, the parties filed a joint Stipulation (#1148) Regarding Motion *in Limine* to Exclude Other Act Evidence in which the parties stipulated:

> At the time Shawna Cox was arrested, she had in her possession an SD card and two flash drives. These three electronic devices contained over 500 pages of official documents that were scanned or downloaded from files on the Malheur National Wildlife Refuge, without the permission of the Refuge's employees.

In that Stipulation the parties also agreed "no government witness will testify at trial that documents containing the locations of sacred Native American artifacts were stolen from the Refuge or were unaccounted for after the occupation, unless a defense attorney or self-represented party makes such an inquiry on cross-examination." As a result of these Stipulations, the

parties agree Cox's Motion is moot.

Accordingly, the Court **DENIES as moot** Cox's Motion (#1046) *in Limine*.

PARTIES' PROPOSED EXPERT WITNESSES

I. Defendant Shawna Cox's Expert Witness Disclosure (#1024) - R. McGreggor Cawley, Ph.D.

The Court excludes Dr. Cawley's testimony as irrelevant and finds, in any event, that its probative value is significantly outweighed by the risk of confusing the issues, misleading the jury, and wasting time. During his *Daubert* hearing Dr. Cawley provided extensive testimony regarding the history of differing opinions over federal ownership of land in the West and the management of such lands. Although Dr. Cawley's testimony provides some context for Defendants' asserted intention to protest the federal ownership and management of land, Dr. Cawley's proferred testimony went far beyond the premise of providing context for the jury to have a basic understanding of Defendants' asserted objections to federal land ownership and management. Defendants may testify and introduce evidence regarding their intent throughout the events at the MNWR including testimony and evidence in support of the assertion that Defendants' intent was to protest federal land ownership and management, but expert testimony is not necessary for the jury to

understand the issues that Defendants assert they went to the MNWR to protest.

II. Defendant Shawna Cox's Expert Witness Disclosure (#1025) - Angus P. McIntosh II, Ph.D.

The Court excludes Dr. McIntosh's testimony as irrelevant. Although the Court finds Dr. McIntosh is qualified to testify as an expert, his proffered testimony regarding his limited research into whether the federal government properly owns the land that forms the MNWR and the effect of *United States v. Otley*, 127 F.2d 988 (9th Cir. 1942), is not relevant to any issue that will be submitted to the jury in this case.

III. Defendant Ryan Bundy's Expert Witness Qualifications and Summary of Anticipated Testimony (#1037) - Charles Stephenson

In his Expert Notice, Defendant Ryan Bundy sought to introduce the testimony of Charles Stephenson for the purpose of distinguishing the threatening nature of brandishing a firearm from merely possessing or carrying a firearm in a non-threatening way from the perspective of the person carrying it. The Notice also addressed law-enforcement use-of-force tactics. In Ryan Bundy's offer of proof,[4] however, Stephenson only testified regarding the difference between the possession and brandishing of a firearm and the potentially threatening and nonthreatening nature of those respective actions from the perspective of the

[4] Ryan Bundy and Marcus Mumford, counsel for Defendant Ammon Bundy, conducted the offer of proof for Stephenson.

person handling the firearm and did not offer any opinion regarding law-enforcement use-of-force tactics. On August 26, 2016, after the Pretrial Conference concluded, Defendant Ammon Bundy filed a Revised Notice (#1117) of Expert Testimony on Issues of Firearms, Force, and Brandishing and the government filed a Response (#1162). In the Revised Notice Ammon Bundy limits Stephenson's testimony to the extent to which various actions with firearms may be intended to be threatening or nonthreatening from the perspective of the person handling the firearm.

The Court finds Stephenson is qualified to testify generally regarding the extent to which various actions with a firearm can be considered threatening or nonthreatening from the perspective of the person handling the firearm, and the Court concludes such testimony is relevant to Defendants' theory of the case that their possession of firearms does not establish an intent to threaten or to intimidate. Unless the government opens the door, however, Stephenson may not testify regarding a legal or technical definition of "brandishing." Whether certain actions fit the definition of "brandishing" is not an element of any charged offense and, therefore, such testimony is irrelevant. Similarly, Stephenson is not permitted to testify regarding which actions would be considered sufficient justification for a "force response" by law enforcement because such testimony also is

irrelevant.

Accordingly, the Court concludes Stephenson's testimony is admissible only on the basis described above.

IV. Defendant Shawna Cox's Notice (#1102) of Expert Witness - Stan Vaughn

During the Pretrial Conference on August 24, 2016, Cox filed an Expert Notice as to Stan Vaughn, Ph.D., in which she asserts Dr. Vaughn, an "auditor," would "testify regarding the outrageous charges and financial claims of the Government" against Defendants. At the Pretrial Conference, however, the government represented it did not intend to introduce at trial any evidence regarding the cost of restoring the MNWR to its previous condition. Accordingly, the Court excludes Dr. Vaughn as irrelevant to the issues for the jury.

In addition, the Court notes Cox's Expert Notice as to Stan Vaughn was untimely because it was filed after the August 19, 2016, deadline for such filings pursuant to Order (#1041) issued August 16, 2016.

V. Defendant Shawna Cox's Notice (#1103) of Expert Witness - James O'Hagan

During the Pretrial Conference on August 24, 2016, Cox filed an Expert Notice as to James O'Hagan. The Court notes the Expert Notice and attached Exhibits contain a significant amount of material that is not relevant to these proceedings. Of the material in the Notice as to O'Hagan that may be relevant to

these proceedings, it appears O'Hagan would be presented as a fact witness rather than providing any expert opinion. To the extent that O'Hagan is offered as a fact witness, therefore, the Notice of Expert Witness is moot. To the extent that O'Hagan is offered as an "expert witness," there is not any basis to admit his testimony as such, and, therefore, the Notice is ineffective.

GOVERNMENT'S REQUESTS FOR JUDICIAL NOTICE

In its Trial Memorandum (#958) the government requests this Court take judicial notice that (1) the MNWR is a federal property located on federally-owned land operated and managed by the United States Fish and Wildlife Service (USFWS) on behalf of the United States Department of the Interior and (2) employees of the United States Department of the Interior, including the USFWS and the Bureau of Land Management (BLM), are officers of the United States.

Federal Rule of Evidence 201(b) provides "[t]he court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." The court may take judicial notice of an adjudicative fact *sua sponte* or at the request of a party at any stage of the proceeding, but "[o]n timely request, a party is

entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard." Fed. R. Evid. 201(e). A court, however, may only take judicial notice of "an adjudicative fact only, not a legislative fact." Fed. R. Evid. 201(a).

The Court declines to take judicial notice that BLM or USFWS employees are "officers of the United States" because such a determination rests on the adjudication of legislative facts. The Court concludes the question whether such employees are "officers of the United States" is more appropriately addressed in the Court's instructions to the jury on the law than in a request for judicial notice.

The Court notes, however, the Pretrial Conference proceedings did not include oral argument on the government's request that the Court take judicial notice that the MNWR is a federal property located on federally-owned land and is operated by the USFWS. The parties notified the Court by email that at least one Defendant requests an opportunity to be heard on the issue. Accordingly, the Court will address that matter at the hearing on Tuesday, September 6, 2016.

DEFINITION OF "OFFICERS OF THE UNITED STATES" IN COURT'S PRELIMINARY JURY INSTRUCTIONS

Defendants have requested a jury instruction that limits the definition of "officers of the United States" as relevant to Count One to only those officers who are appointed by the President of the United States and confirmed by the United States Senate. The Court notes, however, that the term "officers of the United States" in 18 U.S.C. § 372 has been applied in far broader circumstances that those individuals who are appointed by the President and confirmed by the Senate. *See United States v. Fulbright*, 105 F.3d 443, 448 (9th Cir. 1997)(finding evidence of a conspiracy to impede a United States bankruptcy judge by force, intimidation, or threat is sufficient to sustain a conviction under § 372), *overruled on other grounds by United States v. Heredia*, 483 F.3d 913, 921 (9th Cir. 2007). *See also United States v. Brown*, 669 F.3d 10, 19-20 (1st Cir. 2012)(affirming conviction under § 372 for conspiracy to impede U.S. Marshals); *United States v. Rakes*, 510 F.3d 1280, 1284-85 (10th Cir. 2007) (affirming conviction under § 372 for conspiracy to impede an Assistant United States Attorney).

Accordingly, the Court declines to adopt Defendants' requested definition of "officers of the United States." As noted, the Court considers Defendants' objection to the Court's jury instruction regarding "officers of the United States" to be

a continuing objection, and, therefore, Defendants need not re-raise this issue in order to preserve it for appeal.[5]

DEFENDANTS' *STRICTISSIMI JURIS* ARGUMENTS

Defendants filed a Memorandum (#1145) Regarding Application of *Strictissimi Juris* and Request to Reconsider Admissibility of Co-Conspirator Statements in which they contend the doctrine of *strictissimi juris* will affect these proceedings in several respects. In particular, Defendants contend *strictissimi juris* in this case operates to narrow the scope of relevant evidence that the government can produce to only that evidence that is directly linked to the illegal object of the alleged conspiracy, to exclude statements that would otherwise be admissible as co-conspirator statements under Federal Rule of Evidence 801(d)(2)(E), to provide a basis to scrutinize any motions for judgment of acquittal to ensure there is sufficient evidence that each Defendant had the requisite specific intent to help accomplish the illegal object of the alleged conspiracy, and to limit jury instructions because "evidence of First Amendment speech requires a heightened level of scrutiny" and the jury may not "assign guilt to any individual based on the actions of the

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[5] The Court notes the parties' Joint Notice (#1123) as to the Preliminary Jury Instructions addresses these issues and memorializes the parties' previous positions that they submitted informally.

group or other group members."

In *Hellman v. United States*, 298 F.2d 810 (9th Cir. 1961), the defendant was charged with violating the Smith Act, 18 U.S.C. § 2385. The defendant was indicted under the "membership clause" of the Smith Act, which required proof of two elements:

> (1) that a society, group, or assembly of persons (here the Communist Party) advocated the violent overthrow of the Government, in the sense of present advocacy to action to accomplish that end as soon as circumstances were propitious; and (2) that defendant was an active member of that society, group or assembly of persons (and not merely a nominal, passive, inactive or purely technical member) with knowledge of the organization's illegal advocacy and a specific intent to bring about violent overthrow of the Government as speedily as circumstances would permit.

Hellman, 298 F.2d at 811-12 (citing *Scales v. United States*, 367 U.S. 203, 220-21 (1961)). Relying on *Scales* and *Noto v. United States*, 367 U.S. 290, 296 (1961), the Ninth Circuit noted "Smith Act offenses require strict standards of proof," which meant "'this element of the membership crime, like its others must be judged *strictissimi juris* for otherwise there is a danger that one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes . . . which he does not necessarily share.'" *Hellman*, 298 F.2d at 812 (quoting *Noto v. United States*, 367 U.S. at 299-300)(omissions in original). Because the political party at issue in *Hellman* had "legal aims

as well as the assumed illegal aims," an "active member with knowledge of both the legal and illegal aims might personally intend to effectuate only the Party's legal objectives." *Hellman*, 298 F.2d at 812.

The Ninth Circuit summarized the factual record as follows:

> Hellman was an exceedingly active member of the Party. He served as an organizer for the states of Montana and Idaho. He regularly attended state and regional meetings. He taught extensively in Party schools, recruited members into the Party, organized youth camps, participated in the Party underground and distributed Party literature. The evidence shows that Hellman also sold subscriptions to Party publications, solicited contributions for the Party, requested persons to attend Party meetings, and concealed his own membership in the Party by signing a non-Communist affidavit.

Id. at 813. Applying a standard that required the illegal intent to be demonstrated by "clear proof," the Ninth Circuit found "however sufficient these facts may have been to prove that Hellman was an active member of the Party, . . . they do not give rise to a reasonable inference that he specifically intended to overthrow the Government by force and violence at the first propitious moment." *Id.*

Although the concerns that underpin *strictissimi juris* have general application to the First Amendment issues in this case, those concerns are largely already addressed by the narrow focus of the conspiracy charged in Count One and the legal ramifications that flow from the narrow focus of the charged conspiracy. The Court intends to give Preliminary Jury

Instructions, for example, that provide "[t]he government must also prove beyond a reasonable doubt that a particular Defendant became a member of such conspiracy knowing of its illegal object and specifically intending to help accomplish that illegal object regardless whether the particular Defendant or other individuals may have also had other, lawful reasons for their conduct."[6] Similarly, those Preliminary Jury Instructions will instruct the jury that "a person does not become a conspirator merely by associating with one or more persons who are conspirators, nor

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[6] The Court notes *Defendants* have requested the Court remove the following language from the Preliminary Jury Instructions:

> Defendants' political beliefs are not on trial. Defendants cannot be convicted based on unpopular beliefs. Although speech and assembly are generally protected by the First Amendment, that protection is not absolute, and it is not a defense to the conspiracy charged in Count One.
>
> For example, "threats" and "intimidation," as defined in these instructions, are not protected by the First Amendment.
>
> On the other hand, a defendant's speech that merely encourages others to commit a crime is protected by the First Amendment unless that defendant intended the speech to incite an imminent lawless action that was likely to occur.
>
> Thus, you may consider the purpose of a Defendant's speech and expressive conduct in deciding whether the government proved beyond a reasonable doubt that any Defendant agreed with another to impede officer of the United States Fish and Wildlife Service and/or Bureau of Land Management by force, intimidation, or threats.

The Court is still considering whether to include this subject in the Preliminary Jury Instructions.

merely by knowing that a conspiracy exists."

The Court's expected jury instructions, therefore, sufficiently guide the jury and preclude any finding that any Defendant joined the charged conspiracy based solely on lawful, protected conduct, intent, or association. Similarly, in the event any Defendant makes a motion for a judgment of acquittal at the end of the government's case-in-chief, the Court will scrutinize the record to determine whether sufficient evidence exists from which the jury could find the particular Defendant joined the conspiracy knowing of its illegal object (*i.e.*, to impede officers of the United States by force, intimidation, or threats as defined in the Preliminary Jury Instructions) and specifically intended to help to accomplish that object.

In any event, so tailored, *strictissimi juris* does not change the standard that the Court has been applying to relevant evidence or the admission of statements under Rule 801(d)(2)(E). Evidence remains relevant only to the extent that it has bearing on whether a Defendant joined (or did not join) the charged conspiracy with the requisite intent. Similarly, the jury may only consider statements of a co-conspirator to the extent that the jury finds the alleged conspiracy existed and the particular Defendant against whom the statement is offered joined the charged conspiracy knowing of its illegal object and intending to help to accomplish it. As noted, that charged conspiracy relates

only to the alleged conspiracy to "impede officers of the United States by force, intimidation, or threat." To the extent that a co-conspirator statement does not have any direct or circumstantial bearing on the charged conspiracy, therefore, that statement cannot be admitted under Rule 801(d)(2)(E).

The Court underscores, however, this is precisely the same standard that the Court applied to the evidence discussed previously in this Order, and it is the same standard that the Court will apply in the event of additional objections at trial. The Court, therefore, concludes *strictissimi juris* does not mandate reconsideration of the Court's evidentiary rulings because the Court has been applying the necessary standard of admissibility, relevance, and sufficiency to date and will continue to do so.

IT IS SO ORDERED.

DATED this 1st day of September, 2016.

ANNA J. BROWN
United States District Judge